IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: SEHEL, J.A., FIKIRINI, J.A. And KHAMIS, J.A.)

CIVIL APPEAL NO. 52 OF 2021

ANNA ALPHONCE KASEMBE..... APPELLANT

VERSUS

DORA KAWAWA FUSI (*As the Administratrix of the Estates of the Late Secilius Edward Fussi*).....1st RESPONDENT
MODEST DAVID CHONAPI MAPUNDA.....2nd RESPONDENT
ELLY GIFT S. F.U.S.S.I.....3rd RESPONDENT
BRICK HOUSE COMPANY LTD.....4th RESPONDENT
JONES SECILIUS EDWARD FUSI.....5th RESPONDENT

(Appeal from the Judgment and Decree of the High Court of Tanzania, Land Division at Dar es Salaam)

(Rumanyika, J.)

dated the 11th day of December, 2020

in

Land Case No. 152 of 2017

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JUDGMENT OF THE COURT

25th September & 31st October, 2023

FIKIRINI, J. A.:

The Mtongani Village council is claimed to have given the late Alphonce Kasembe a piece of land measuring 2.5 acres (the suit land) in the Mbezi Kilongawima area, Kinondoni District in Dar es Salaam. According to the record, this occurred on 15th April, 1975. After almost twenty (25) years and to be specific, on the 3rd April, 2000, the late

Alphonce Kasembe, out of love and affection, gave the suit land, which had two houses built on it, to his daughter Anna Alphonce Kasembe, currently the appellant, by way of a deed of gift.

It is the said piece of land that propelled the institution of Land Case No. 152 of 2017 before the High Court, Land Division on 11th December, 2020, when the appellant sued the respondents, namely Dora Kawawa Fusi (*As Administratrix of the Estates of the Late Secilius Edward Fussi*), Modest David Chonapi Mapunda, Elly Gift S. Fusi, Brichouse Company Limited and Jones Secilius Edward Fusi, hereinafter referred as the 1st, 2nd, 3rd,4th and 5th respondents. In the twice amended plaint, the appellant prayed to be declared the rightful owner of the suit land, that the respondents were trespassers, and a declaration that the sale agreements between the 1st, 2nd, 3rd and the 4th respondents were illegal.

In their joint written statement of defence, the 1st,3rd, 4th and 5th respondents contested the appellant's claim. According to them, the suit land was vested in His Excellency, the President of the United Republic of Tanzania through G.N. No. 383 of 1992, declaring the area planned and subject to survey, extinguishing the rights of occupants. The survey plan dated 25th February, 2004 was registered as Survey Plan No. 35561 and

plots created were allocated to different people. In the allocation, the 1st respondent's husband and his two sons, the 3rd and 5th respondents, were said to have been allocated Plot Nos. 2108, 2109 and 2110 Block "I" whereas the 3rd respondent was allocated Plot No. 2111, all claimed to be allocated by the Ministry of Lands.

In a separate written statement of defence, the 2nd respondent contested the appellant's assertion, contending that he purchased the suit land from the late Selicius Edward Fussi (the 1st respondent's husband). On that note, he raised a counterclaim, longing to be declared the rightful owner of the suit land.

At the hearing, which commenced on 1st December, 2020, the appellant had four (4) witnesses. From the evidence it transpired that in 2011, the late Selicius Edward Fusi surveyed a piece of land which partly encroached on the appellant's suit land. Confronted, he admitted to having invaded the appellant's suit land. To resolve the problem, the two settled on the exchange of plots whereby the late Selicius Edward Fusi would give the appellant another piece of land of his known as Plot No. 689 Block "C" located at Mtoni Kijichi. The promise would not come to fruition as aimed, as the late Selicius Edward Fusi passed away. However, since the 1st

respondent was aware of the agreement, she executed the contract on 2nd May, 2011 by exchanging the plots as reflected in exhibit P3.

The drama did not end with the exchange of plots, as on 25th February, 2017, the 2nd respondent's workers invaded the suit land and started clearing it. Upon inquiry, the appellant was informed that the suit land was already surveyed, out of which Plot Nos. 2108, 2109 and 2111 were obtained. The appellant also learnt that Plot Nos. 2108 and 2109, considered part of the suit land, were in the 1st respondent's husband's name.

The plaintiff's case was closed on 2nd December, 2020. Right after close of the plaintiff's case, Mr. Nazario Michael, counsel for the 1st, 3rd, 4th and 5th respondents, prayed for an adjournment to 4th December, 2020. The prayer was granted. On the 4th December, 2020, there was yet another application for adjournment to 11th December, 2020. The reason being, Mr. Michael could not procure their intended witnesses.

Mr. Sosten Mbedule, counsel for the 2nd respondent, also sought an adjournment, though for a different reason. His request was premised on Order VI rule 17 of the Civil Procedure Code, Cap. 33 R. E. 2019 (the CPC), for leave to amend the written statement of defence and counterclaim to

join the following parties: a new buyer of the suit land one Thomas Oisu, Kinondoni Municipal Council, Commissioner for Lands, Attorney General and the Registrar of Titles. The prayers for adjournment resulted in an *ex parte* judgment dismissing with costs the plaintiff's case for failure to prove her case on a balance of probabilities on the one hand and the other; the trial Judge failed to declare who is the lawful owner of the suit land.

Aggrieved, the appellant approached this Court with four (4) grounds of appeal. But for the reason that shall be apparent soon we shall not reproduce them. The 1st respondent, likewise aggrieved by the decision, lodged a notice of cross-appeal. After pondering both notices of appeal, we reckoned the issue on the right to be heard was pertinent and called upon the counsel for the parties to address us that ground. This was one of the grounds in the 2nd respondent's cross-appeal. He had listed two (2) grounds of complaint, namely:

1. *That the Honourable trial Judge erred in law and fact when he failed to determine the counterclaim.*
2. *That the Honourable trial Judge erred in law and fact when he failed to give a right to be heard regarding counterclaim.*

The hearing of the appeal was slotted for 25th September, 2023. Before us was Mr. Rajabu Mrindoko, assisted by Ms. Stella Simkoko,

learned advocates appearing for the appellant. Messrs Nazariu Michael Buxay and Sosten Mbedule, learned advocates, appeared for the respondents.

Giving a background to what transpired at the trial court prior to the judgment pronounced on 11th December, 2020, Mr. Mrindoko, contended that the case was cause listed in a program known as Big Result Now (BRN), in the spirit of clearing backlogged cases. On the fateful day, contended the learned advocate that, after the close of the plaintiff's case, the respondents' counsel prayed for adjournment, albeit for different reasons.

Mr. Michael counsel for the 1st, 3rd,4th and 5th respondents prayed for an adjournment after he failed to secure his key witness who was in Arusha and could not make it to Dar es Salaam and in court on time. Before the court could make an order, Mr. Mbedule also rose and seek for an adjournment. His prayer for an adjournment was premised on the fact that the 2nd respondent intended to join to the suit the Kinondoni Municipal Council, Attorney General, Registrar of Titles and Commissioner for Lands.

The trial Judge proceeded to close the defence case and continued to compose his judgment. Mr. Mrindoko asserted that even if the trial Judge

was not amused with the prayer for adjournment, he was still supposed to grant the respondents a leave to defend the case at the stage it was. But by closing the defence case and proceeding to compose judgment, the trial Judge denied the respondents their right to state their defence and, for the 2nd respondent in particular, the right to be heard on his counterclaim. Moreover, in his judgment, the trial Judge neither addressed the counter claim nor declared who was the rightful owner of the suit land.

Fittingly acknowledging the Court's observation that, the proceedings are marred with irregularities, Mr. Mrindoko urged us to cure the defect by invoking the powers bestowed on us under section 4 (2) of the Appellate Jurisdiction Act, Cap. 141 R. E. 2019 (the AJA) and nullify the proceedings after the close of the plaintiff's case, quash the judgment and permit parties to be heard. On the costs, he prayed for the appellant not to be condemned with costs since the concern was raised by the Court.

Mr. Michael, in his short submission, aside from supporting the Court's observation and Mr. Mrindoko's submission, drew our attention to how the proceedings were conducted. He highlighted the trial court's short notice and severity of the decision when the 1st, 3rd, 4th and 5th respondents failed to procure their witnesses, leading to the close of their

case. By closing the defence case, the trial Judge denied the respondents their right to be heard.

Closing the submission was Mr. Mbedule. He complimented the point raised by the Court as significant as it touches the 2nd respondent's cross-appeal. Reiterating what Mr. Mrindoko has submitted, he, on a different note, contended that the trial court closed the defence case without considering it was the respondents' right to close their respective cases. And that in closing the defence case, the trial Judge overlooked the 2nd respondent's right to prosecute his counterclaim, who, as per the schedule, was to bring his witnesses on 5th December, 2020. He equally faulted the trial Judge for not ruling on the application for an adjournment by Mr. Michael after failure to procure their witness and Mr. Mbedule, who intended to amend the 2nd respondent's written statement of defence and plead more parties.

Maintaining the stance that the proceedings were irregular, he implored us to nullify the proceedings from 4th December, 2020 after the close of the plaintiff's case and quash the purported *ex parte* judgment, which, in his view, did not fit the definition provided under the CPC and order the record be remitted back to the lower court for the hearing.

Fortunately, the right to be heard is not new to us. In our various decisions, we have dealt with the issue, and now, it is a settled law as propounded in the case of **I. P. T. L. v. Standard Chartered Bank (HONG KONG) Ltd,** Civil Revision No. 1 of 2009 (unreported), that:

> *"No decision must be made by any court of justice/ body or authority entrusted with the power to determine rights and duties so as to adversely affect the interests of any person without first giving him a hearing according to the principles of natural justice".*

Emphasizing on the principle, the Court has pronounced itself with clarity in the other decisions that the consequences of breach or violation of the right to be heard renders the proceedings and decisions and/or orders made therein a nullity even if the same decision would have been reached had the party has been heard unless expressly or impliedly authorised by law. The Court underscored the above in the case of **Abbas Sherally & Another v. Abdul Sultan H.M. Fazalboy**, Civil Application No. 33 of 2002 (unreported), in which the Court had this to say:-

> *"That right is so basic that a decision which is arrived at in violation of it will be nullified even if the same decision would have been reached had the*

party been heard, because the violation is considered to be a breach of natural justice".

The violation of a right to be heard has far-reaching consequences, as it is not only a breach of natural justice but also a meddling and abrogation of the constitutional guarantee of the fundamental right to be heard as enshrined under Article 13(6)(a) of the Constitution. See, **Mbeya Rukwa Autoparts and Transport Limited v. Jestina George Mwakyoma**, Civil Appeal No. 45 of 2000 and **Suba Agro-Trading & Engineering Company Ltd & Another v. Seedco Tanzania Limited**, Civil Appeal No. 184 of 2020 (both unreported).

Given the precise position of the law, we now turn back to the appeal before us, which should not pose a challenge in its determination. Adjournments are both a sword and a shield. Adjournment becomes a sword when a party applies it to delay the conclusion of the case before the court, hence a hindrance to the timely dispensation of justice, on the one hand, and on the other, adding up to the backlog of cases. On the contrary, adjournment can become a shield, as sometimes it is unavoidable not to grant an adjournment based on different sound reasons advanced in each particular circumstance.

Our examination of the record of appeal revealed that after the hearing and close of the plaintiff's case, Mr. Michael, the counsel for the 1st, 3rd, 4th and 5th respondents and Mr. Mbedule, counsel for the 2nd respondent, prayed for adjournment. As reflected on pages 790 – 792 of the record of appeal, after their submissions, the trial Judge, instead of ruling one way or the other on the prayers made by the two counsel for the parties and resisted by the counsel for the appellant, he proceeded to dismiss the suit.

The reason given by the trial Judge was the case was a backlog. While we can reason with him and largely detest unreasonable delay in the conclusion of cases, we think the reasoning defeated the logic in the circumstance of the present appeal. This is because, in the dispensation of justice, speedy disposal, natural justice, statutory and constitutional rights are all to be observed and applied in tandem.

In answering whether the reaction was judicious, we are of the firm view that trial Judge acted hastily. Our reasons for saying that are not farfetched. *First and foremost*, while we admit backlogs are a pain and a stumbling block in dispensation of justice and that this particular case was one of the backlog cases and BRN was explicitly established to clear all the

backlogs, we are nonetheless of the view that the trial Judge was obliged to rule out one way or the other on the application for adjournment sought. In the circumstances of the present appeal, we find there was sufficient cause to permit an adjournment.

Moreover, adjournments are provided for under Order XVII rules 1 (1), (2) and (3) of the CPC. Specifically under sub-rule (1), which provide thus:-

> "1.-(1) *At any stage of the suit the court may, if sufficient cause is shown, grant time to the parties or to any of them, and may from time to time adjourn the hearing of the suit".*

See, **Suba Agro-Trading & Engineering Company** (supra), faced with an akin scenario, the Court considered a refusal to grant an adjournment as a clear abrogation of the well-established rules of natural justice when we stated:-

> *"...that a party to a case must be given a fair hearing including the provision the effective and adequate opportunity to defend his case unless provided otherwise by the law".*

Secondly, the trial Judge could have adjourned the hearing to the next day 5th December, 2020, which was expressly agreed would be the 2nd

respondent's day of presenting his case. Apart from his right to answer the claim levelled against him, the 2nd respondent deserved to be heard on the counter claim. Likewise, the appellant and the other respondents had filed their written statement of defence to counter claim. They also had a right to be heard.

According to Order VIII rule 9 (2) of the CPC, a counter claim like a plaint is a separate and independent suit that should have been dealt with thoroughly. The provision provides as follows:-

> *"Where a counter claim is set -up in a written statement of defence, the counter claim shall be treated as a cross suit and the written statement shall have the same effect as a plaint in a cross suit, and the provision of Order VII shall apply mutatis mutandis to such written statement as if it were a plaint".*

The 2nd respondent was undoubtedly not heard on his counter claim raised in the written statement of defence filed on 1st September, 2020.

With due respect, given the settled position of the law, we find no good reason whatsoever that could justify the trial Judge's decision. Failure to afford the respondents to exercise their right to be heard and the 2nd respondent in particular to prove his counter claim, the High Court's

decision was unquestionably a violation of the parties' constitutional right to be heard. The proceedings from 4th December, 2020 after the appellant has closed her case, are thus nullified. We accordingly quash and set aside the judgment which resulted from the null proceedings. We order the record to be remitted to the High Court for the hearing to continue from 4th December, 2020 after the close of the appellant's case. We refrain from ordering costs, considering the omission was not caused by the parties.

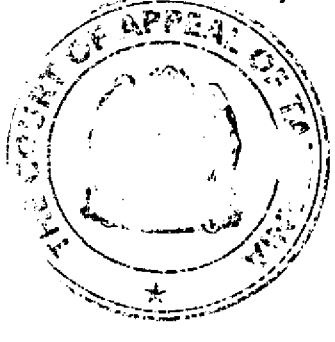
DATED at **DAR ES SALAAM** this 27th day of October, 2023.

B. M. A. SEHEL
JUSTICE OF APPEAL

P. S. FIKIRINI
JUSTICE OF APPEAL

A. S. KHAMIS
JUSTICE OF APPEAL

The Judgment delivered this 31st day of October, 2023 in the presence of Mr. Sosten Mbekule, learned counsel for the 2nd respondent also holding brief for Ms. Stella Simkoko, counsel for the appellant and Mr. Nazariu Michael Buxay, learned counsel for the 1st, 3rd, 4th and 5th respondents, is hereby certified as a true copy of the original.



S. J. KAINDA
REGISTRAR
COURT OF APPEAL